

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**

PLEASANT VALLEY ELEMENTARY SCHOOL
DISTRICT,

Employer,

and

GROUP OF EMPLOYEES,

Petitioner,

and

SEIU LOCAL 998,

Exclusive Representative.

Case No. LA-DP-339-E

Administrative Appeal

PERB Order No. Ad-333

March 22, 2004

Appearances: Timothy Kennaley, Sr., for Group of Employees; Barry L. Hammitt, Executive Director and Betty Trist, Field Representative, for SEIU Local 998.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Timothy Kennaley, Sr. (Kennaley) on behalf of Group of Employees of a Board agent's administrative determination regarding objections to the results of an election over Kennaley's petition to decertify SEIU Local 998 (SEIU).

After review of the record, we affirm the Board agent's administrative determination consistent with the discussion below.

BACKGROUND

Kennaley's petition sought to decertify SEIU as the exclusive representative of an operations and support services unit in the Pleasant Valley Elementary School District

(District). The election was held by mail ballot. Ballots were mailed from PERB on April 15, 2002¹, were due at PERB by May 6, and were counted on May 7. When the ballots were counted, of 71 eligible voters, 64 returned ballots, 32 voted for SEIU, 30 for no representation, and two ballots were declared void for not meeting the signature requirements in the Board's voting instructions. Kennaley filed timely objections pursuant to PERB Regulation 32738², and SEIU and the District filed responses to the objections. In the administrative determination, the Board agent dismissed the objections.

The objections were as follows:

Objection One: The District provided the phone numbers of unit members to SEIU but not to Kennaley.

Objection Two: SEIU conducted a verbal and written smear campaign against Kennaley and his wife and also jeopardized his safety by publishing his authorization card, which showed his address and unlisted phone number. This conduct invoked fear in him and may have had the same effect on other unit members.

Objection Three: Unit member Mike Harrison (Harrison) told Kennaley and unit employee Harry Anderson (Anderson) that Nicasio Arucan (Arucan), a unit employee and SEIU shop steward, told Harrison that Supervisor of Maintenance and Operations, David Schmidt (Schmidt), said he would find a way to fire Kennaley, Anderson, and another unit member if SEIU lost the election. When questioned, Arucan told Kennaley that he was "just kidding." The same day, Kennaley and two other unit employees sent a memo to Poul Hanson, director of facilities, maintenance and operations, requesting an investigation of the matter. At

¹All dates refer to 2002 unless otherwise noted.

²PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq.

an investigatory meeting held by the District on April 16, Arucan admitted to fabricating the threat and falsely attributing it to Schmidt. Arucan also asserted that it could be true since management could fire employees if no union represented them. Kennaley states that, at the April 16 meeting, the District verbally reprimanded Arucan. Kennaley alleged that he also learned that Harrison had received a verbal reprimand. Kennaley further alleges that after the meeting, SEIU representatives met with Harrison, Schmidt, and Poul Hanson, District director of facilities, maintenance and operations to discuss Harrison's reprimand. Kennaley acknowledged that he was unaware of the substance and outcome of that meeting.

Kennaley asserts that the threat was believable in light Schmidt's position as a supervisor and his past position as SEIU president. Other employees heard about the incident and so it could have affected their votes.

Objection Four: SEIU campaigned during spring break on work time in violation of District policy. Four unit employees, including Kennaley, provided statements that they were approached by SEIU Representative Betty Trist (Trist) about the election campaign. There was another unit employee, Rene Quilantong, with Kennaley when this happened. Another individual, Raymond Weed (Weed), allegedly distributed SEIU campaign literature during his work hours. Kennaley claims that this is not permissible conduct and gives SEIU an unfair advantage.

In the dismissal, citing Board precedent, the Board agent enunciated the standard for setting aside an election under PERB Regulation 32738. Under that standard, Kennaley must present a prima facie case showing that specific acts took place that interfered with the election process. This standard involves a two-prong test: (1) improper conduct, and (2) an objective impact on voters. The basic inquiry is whether the unlawful conduct created a "probable impact on the employees' vote." In applying this test, the Board seeks to balance the need for

conduct of elections without undue influence with an assurance that employees' votes are not unnecessarily set aside. Applying this test, the Board agent found that Kennaley's objections did not meet one or the other of these prongs and therefore, dismissed all four objections.

KENNALEY'S APPEAL

Objection One: Kennaley objects to the fact that the unlisted phone numbers for more than 30 out of 71 eligible unit voters were denied to him. He states that this significantly impacted the outcome of the election by not creating a "level playing field" since SEIU had available more avenues of communication with unit employees.

Objection Two: Kennaley says that co-workers told him that SEIU's publication of his union authorization card was a form of intimidation and that it was geared to scare people. The gist of the publication was, "this is what this guy did, here is his address, and come and get him!!!" As he has worked for the District for 15 years, most employees know that he lives in Camarillo. He cites the prevalence of news reports of violence in the workplace as well as a vague incident involving a trash can stolen from District premises. He says most employees are now afraid to speak out and as a result, the "smear campaign" clearly impacted the election.

Objection Three: At the time of the election, Arucan was an SEIU shop steward, who knew what he was doing when he made the statements about Kennaley and his co-workers being fired if SEIU lost the election. As a shop steward, Arucan should be trained in what to say or not say. It was Kennaley and his co-workers' understanding that Arucan was acting as a shop steward when making those statements. The District only investigated at Kennaley's request. For the first time on appeal, Kennaley asserts that when the District reprimanded Harrison, SEIU defended him and thus obtained Harrison's vote.

Objection Four: Kennaley believes that Schmidt covered for Weed when stating that he agreed to give Weed an early break. The change in break schedules further contradicted schedules set two weeks before this incident. Kennaley also argues that Trist engaged in misconduct by campaigning during work time. In his objections, Kennaley presented to PERB statements from several employees but alleges some did not come forward because of fear of reprisals from SEIU due to the SEIU flyer in which Kennaley was personally attacked. The election was close: of 71 eligible voters, 32 voted for SEIU, 30 voted for no union. Kennaley asserts that the election would have been different if SEIU had not engaged in misconduct.

SEIU’S RESPONSE

SEIU states that Kennaley has provided no new evidence to support his objections to the election and requests that the Board uphold the Board agent’s dismissal.

DISCUSSION

PERB Regulation 32738(c)(1) allows the Board to entertain objections to the election process if “the conduct complained of interfered with the employees’ right to freely choose a representative.” Under PERB Regulation 32738(d):

(d) The statement of the objections must contain specific facts which, if true, would establish that the election result should be set aside, and must also describe with specificity how the alleged facts constitute objectionable conduct within the meaning of subsection (c) above.

The Board agent must dismiss objections that fail to satisfy these requirements. (PERB Reg. 32738(g).)

Under this standard, Kennaley bears the burden to present specific facts showing interference with the election process. (San Ramon Valley Unified School District (1979) PERB Decision No. 111, at pp. 17, 28-31.) That burden contains two elements: (1) improper

conduct³ as a threshold matter, and (2) a probable impact on the employees' vote. (Jefferson Elementary School District (1981) PERB Decision No. 164, p. 5.) It is not necessary that "actual impact" be found (Clovis Unified School District (1984) PERB Decision No. 389 (Clovis)); instead, the Board will evaluate "the totality of circumstances raised in each case, and when appropriate, the cumulative effect of conduct which forms the basis for the relief requested." (State of California (Department of Personnel Administration) (1992) PERB Decision No. 948-S, proposed dec., at p. 25, citing Clovis.) In other words, the Board will determine whether the misconduct was sufficient to affect the outcome. (State of California (Departments of Personnel Administration, Developmental Services, and Mental Health) (1986) PERB Decision No. 601-S.)

After review of the record, the Board finds that Kennaley has not met his burden to present specific facts showing interference with the election process for the reasons discussed below.

Objection One: The Board disagrees with Kennaley's argument that he is necessarily entitled to the same employee information as SEIU, the exclusive representative, in order to create a "level playing field." By law, the District is required to provide SEIU as the exclusive representative with names, addresses and phone numbers of unit members upon request to allow SEIU to fulfill its duty to represent its members. (Compton Community College District (1990) PERB Decision No. 790; State Center Community College District (2001) PERB Decision No. 1471.) SEIU had requested the information in spring 2001, well before the decertification petition was filed.

³Under an earlier version of the rule, objections must show that the conduct complained about is "tantamount to an unfair practice." The regulation as now written requires "improper conduct." (Pasadena Unified School District (1985) PERB Decision No. 530 (Pasadena).)

The type of information to which Kennaley is entitled is found in the Consent Election Agreement, entered pursuant to PERB Regulation 32724,⁴ which includes the list of voters pursuant to PERB Regulation 32726.⁵ We find that Kennaley received the agreed-upon voter information, i.e., addresses and work sites of unit employees, pursuant to the Consent Election

⁴PERB Regulation 32724(a) provides:

(a) When the Board has determined that an election is required, the Board shall serve on the employer and the parties a Directed Election Order maintaining specific instructions regarding the conduct of the election. The Board may approve a Consent Election Agreement of the parties regarding the conduct of an election.

⁵PERB Regulation 32726 provides, in pertinent part:

(a) At a date established by the Board, the employer shall file with the regional office a list of names of all employees included in the voting unit as of the cutoff date for voter eligibility. Unless otherwise directed by the Board, the voter list for an on-site election shall be in alphabetical order by assigned polling site and shall include the job title or classification, work location and home address of each eligible voter. Unless otherwise directed by the Board, the voter list for a mailed ballot election shall be in alphabetical order and include the job title and home address of each eligible voter, and shall be accompanied by two sets of name and home address labels for each eligible voter.

(b) A list of eligible voters which meets the requirements of subsection (a) above but which contains in lieu of the home address a mailing address for each eligible voter shall be concurrently served by the employer on each other party to the election. Proof of service shall be filed with the regional office. For purposes of this subsection, mailing address means the home address of each eligible voter, except in the case where the release of the home address of the employee is prohibited by law, or if the Board shall determine that the release of home addresses is likely to be harmful to the employees.

(c) Any party which receives the mailing addresses of eligible voters pursuant to this section shall keep these addresses confidential and shall neither distribute them to any other organization or individual nor utilize them for any other purpose.

Agreement, and thus had adequate means to access employees. The Board concludes that the District did not engage in misconduct; and therefore, this objection should be dismissed.

Objection Two: This objection concerns SEIU's alleged smear campaign against Kennaley and perceived threats to the safety of Kennaley and his family. Under Pasadena at pp.13-14, fn. 3, the Board adopted the National Labor Relations Board (NLRB) standard that an election will not be set aside on the basis of the substance of a representation made during a campaign, but only because of the deceptive manner in which it was made. We have reviewed the campaign literature attached to Kennaley's objections and find nothing deceptive in the manner in which it was made. All SEIU literature was clearly identifiable as coming from SEIU. Furthermore, Kennaley had ample opportunity to respond to SEIU and frequently did so.

With regard to publication of Kennaley's union authorization card, the test is whether the conduct "may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." (Clovis quoting NLRB v. Triangle Publications (3rd Cir. 1974) 500 F.2d 597, 598 [86 LRRM 2939].)

For purposes of elections, PERB Regulation 32726 requires that employers provide a list of eligible voters to the Board and to other parties to the election. This regulation provides, in pertinent part:

(c) Any party which receives the mailing addresses of eligible voters pursuant to this section shall keep these addresses confidential and shall neither distribute them to any other organization or individual nor utilize them for any other purpose.

Kennaley's union authorization card, containing an incomplete address and phone number, was inserted into campaign literature mailed to Kennaley on April 11, 2002, in order to show that Kennaley had previously supported SEIU. The union authorization card was not issued pursuant

to PERB Regulation 32726 and so its publication does not violate the regulation. However, even if SEIU engaged in misconduct in publishing the information, the real question is whether publication of the Kennaley's union authorization card reasonably tended to coerce or intimidate voters in the election. There was no explicit or implied threat in the campaign literature. Although Kennaley states on appeal that individual employees informed him that they felt intimidated by the publication of Kennaley's address, neither the identity of the employees, the circumstances, nor the timing of the statements is identified in Kennaley's objections or on appeal. It is unlikely that the publication of an incomplete address and phone number would cause a reasonable voter to feel threatened without evidence of actual threats. We find that this objection did not show probable impact on the employees' votes.

Objection Three: This objection involves Arucan's false statement that the supervisor would fire Kennaley and other unit employees if SEIU lost. We find no impact on the election arising out of this incident. Although Arucan engaged in misconduct, when reported by Kennaley, the District promptly investigated the incident and held a meeting with the affected employees at which the District discredited Arucan's statement. Kennaley opines that SEIU defended Harrison, who informed Kennaley of Arucan's statement and who was then allegedly reprimanded by the District. On appeal, Kennaley asserts that because SEIU defended Harrison, SEIU became Harrison's hero and gained his vote.⁶ We find that Kennaley's assertion is pure speculation and is clearly irrelevant to any potential impact of Arucan's false statement on the election process. Since there was no actual threat of reprisal made by the supervisor and the employees were made aware of Arucan's misrepresentation on April 16, well before the ballots were due, we dismiss this objection.

⁶This conflicts with Kennaley's earlier statement contained in his original objection that he was unaware of the substance and outcome of SEIU's meeting with Harrison and the District management regarding Harrison's alleged reprimand.

Objection Four: This objection involves two incidents in which SEIU officials allegedly campaigned unlawfully during work time. The first one involved unit employee Weed distributing SEIU literature in employee mailboxes during his working hours. The District investigated the matter based upon a complaint it received and the investigation revealed that Weed's supervisor had consented to a different break time to allow Weed to distribute the literature. On appeal, Kennaley accuses Weed's supervisor of covering for Weed but does not provide evidence to prove that accusation. The Board finds the accusation to be mere conjecture and thus, finds no misconduct.

The second incident involves Trist's conduct in approaching Kennaley and other employees about the campaign during work hours. Trist's alleged conduct would violate a District rule and Board precedent barring such activity.⁷ SEIU did not reply to the Board agent's request to provide a declaration responding to this objection. The Board agent thus found misconduct and the Board agrees.

Once misconduct is established, the inquiry then becomes whether the misconduct has a "probable impact on the employees' vote." Looking at the totality of the conduct, Kennaley does not provide any evidence that Trist's conduct caused employees to vote for SEIU. In fact, Kennaley, and at least two of the three other employees submitting statements in support of the objections, expressed displeasure at Trist's interruption of their job duties. The incident also occurred during spring break, sometime between April 1 through April 5, within a week after the District had advised employees to report inappropriate campaign activities.⁸ However, no one complained about Trist. There is no evidence that Trist attempted to coerce or pressure

⁷Cf., Long Beach Unified School District (1980) PERB Decision No. 130.

⁸The District had issued a memo dated March 25 containing election guidelines, which, among other items, advised employees to report inappropriate campaign activities.

employees in any way. We conclude, therefore, that Trist's misconduct did not create a probable impact on the employees' vote.

In light of the above discussion, the Board concludes that Kennaley's objections are without merit.

ORDER

The objections by Timothy Kennaley, Sr. to the election in Case No. LA-DP-339-E are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Neima joined in this Decision.